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No. 88-768

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

VINCENT FRANCO,

Petitioner,

v.

DEPT. OF HEALTH & HUMAN SERVICES,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO CERTIORARI

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Although "sufficiency of the evidence" is not a challenge presented here by Petitioner, evidentiary failures by the Agency are still now asserted.

For example, as part of his challenge to the ability of the Agency to render a constitutional termination decision, Mr. Franco has explicitly asserted that the government has failed to supply any evidence to rebut Petitioner's claims of bias. The issue of bias is always central to the ability of a decision-maker to render a constitutionally valid decision, Goldberg v. Kelly, 397 U.S. 254 (1970) Withrow v. Larkin, 421 U.S. 35 (1975).1/ In the case sub

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1/ The Solicitor's attempt to distinguish Goldberg and Withrow because neither involved the process due a federal employee upon termination, does not apply to the requirement stated in both, that decision-makers are to be non-biased when determining due process rights.

judice, it is the very strong likelihood of bias that Judge Baldwin, in his dissent, found had tainted the multiple decision-making roles held by Ms. Singer, Petitioner's supervisor. He held that she stood too close to the fray to view it objectively. Further, it must be noted that the unrefuted evidence of bias by Ms. Singer against Petitioner Franco was found below to be irrelevant, not non-existent. (Pet. App. 33-34). Therefore, it may be inferred that the issue of bias still is a factor here due to an evidentiary failure by the Agency.

Petitioner Franco argues that the unchallenged existence of bias tainting the termination is a fatal flaw to the constitutional propriety of the procedural used. In Withrow and in Goldberg, the determinations made by decision-makers resolving questions of right to property protected by the Constitution were invalidated. In the first case the Court

determined that even the appearance of bias was deemed enough to taint and thus, invalidate the decision. In the second situation, a decision-maker with prior involvement was deemed inappropriate.

The Solicitor's claim that Arnett v. Kennedy, 416 U.S. 134 (1974) is analogous to the facts here is misplaced. First, in Arnett the allegations against the decision-maker involved acts he is alleged to have performed - but no one could state with certainty that he had performed those acts. To allow a federal employee faced with removal to eliminate officials by verbalizing defamatory remarks about them to engender bias would encourage slander. Here, the acts of the Proposing and Deciding Official were performed without question - Ms. Singer did decide that the performance of Petitioner was unacceptable three separate times. Arnett is clearly distinguishable.

Another important distinction from Arnett must be noted. The actions of the employee incurring the bias of the Deciding Official were not the subject of the termination proceeding. Here, of course, the reasons for suspecting bias are the decisions upon which termination was to be decided.

Finally, if the issue of bias previously discussed was left unresolved by the MSPB, the issue of prejudice is not. Ms. Singer made a forejudgment of Petitioner's work performance long before she raised the hat of Deciding Official to her head. The mental attitude and disposition of the Deciding Official was formulated against Petitioner Franco by her prior determinations of the facts in either of her previous roles. We are not faced here with prior exposure, but with prior decision-making on the same facts. Goldberg, supra.

The effect of that prior decision-making role by Ms. Singer was to deprive Petitioner of his opportunity to be heard. This has not

been addressed by the lower court's majority opinion or the Solicitor's Opposition. It cannot be denied that if the opportunity to be heard did not occur until after the decision has been rendered, Petitioner would have been denied his rights. We here assert that the result for Petitioner is the same and that his hearing was no opportunity at all. As quoted by the Solicitor's Opposition at page 7, "A fundamental requirement of due process is 'the opportunity to be heard' at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Petitioner prays this Court to accept his Writ of Certiorari.

Respectfully submitted,

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Gary T. Brown